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April 16, 2004 R.A. DOCKET ROOM

Honorable Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

In Re: Tennessee Regulatory Authority Rulemaking to Amend Chapter
1220-4-11-.05 (b), Known as the Do Not Call Rule
Docket No 04-00071

Dear Chairman Tate:

Enclosed please find the original and fourteen (14) copies of the Comments of MCImetro Access Transmission Services, LLC and AT&T Communications of the South Central States, LLC Regarding Rule Amendment in the above-referenced docket. Copies have been served on all parties of record.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By

Jon E. Hastings

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

APRIL 16, 2004

IN RE TENNESSEE REGULATORY)
AUTHORITY RULEMAKING TO AMEND) *Docket No 04-00071*
CHAPTER 1220-4-11- 05 (B), KNOWN AS)
THE DO-NOT-CALL RULE)

COMMENTS OF MCI AND AT&T REGARDING RULE AMENDMENT

In response to the Notice, dated March 15, 2004, of the Tennessee Regulatory Authority ("Authority"), MCImetro Access Transmission Services, LLC ("MCI") and AT&T Communications of the South Central States, LLC ("AT&T") respectfully submit these Comments.

Authority rule 1220-4-11- 05 (1)(b) currently states that "(a) residential telephone subscriber will remain in the 'Do Not Call Register' for a period of five (5) years or until the subscriber requests that the Authority removes their name from the Register." The Authority proposes that the rule be amended to state

A residential telephone subscriber will remain on the "Do Not Call Register" until the subscriber requests that the Authority removes his or her telephone number from the Register. No later than January 31st of each year, the Authority shall publish a notice in all newspapers of general circulation in the state informing subscribers on the Register as to how to have their telephone numbers removed from the Register.

The difficulty with the proposed amendment stems from two facts of behavior. First, on average, some 15% to 20% of households across the nation move each year. Federal Trade Commission, Final Amended Telemarketing Sales Rule, 68 Fed Reg 4580, 4640, n. 713 (2003). Therefore, inaccuracies in do-not-call lists invariably accrue as consumers change their telephone numbers. Second, once a consumer adds his or her telephone number to a do-not-call list, there is no motivation to cause him or her to remove that number. The proposed notice provision in the rule amendment does not change this fact. Consequently, telephone numbers would remain in the Register for years unless removed by some agency other than the consumer, again causing the list to become increasingly large and inaccurate. Hence consumers who are assigned a recycled telephone number that remains in the Register will not be able to receive telemarketing calls. Indeed, those not requesting inclusion of their phone numbers in the Register would not even know their numbers were restricted from telemarketing calls.

To this extent the proposed amendment may imply a social judgment that telephone solicitations should be limited beyond existing regulation. Enabling the exercise of consumer choice, however, has been the worthy intent of do-no-call legislation, in Tennessee and elsewhere, and should remain the lodestar of the Authority's rulemaking efforts. The current rule is tailored to further that goal, so that not only will those consumers who do not wish to receive telemarketing calls not receive them, but those consumers who do want to receive telemarketing calls *will* receive them. The proposed amendment, conversely, is precisely the kind of "negative option" that consumer advocates frown upon when used by businesses to deprive consumers of real

choice. It is no more commendable when exercised by government purporting to act in the best interests of consumers.

The existing rule also conforms with recent Federal Communications Commission ("FCC") and state action to create a reasonable period for retention of telephone numbers in do-not-call lists. Less than a year ago, the FCC, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 02-278, Report and Order, FCC 03-153 (rel. July 3, 2003), pursuant to the federal Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. §227, enacted a rule stating that registrations for the federal do-not-call list and company-specific do-not-call requests are effective for at least five (5) years *Id.* ¶ 31. 47 C.F.R. §64.1200 (c)(2) & (d)(6). In *reducing* the period for which a company-specific do-not-call request must be honored, from ten to five years, the FCC concluded that "(t)he length of time that registrations remain valid also directly affects the accuracy of the registry as telephone numbers change hands over time." *Id.* Also last year, the Louisiana Public Service Commission and Mississippi Public Service Commission, respectively, enacted do-not-call rules that include an effective period for registration of five years.¹ General Order, Docket number R-27021, A "Do Not Call" listing for Louisiana Residential Telephonic Subscribers, Final Order Adopting Rule, Docket No. 03-AD-264 (June 18, 2003), Section V.B.4, In re: Order of the Mississippi Public Service Commission Establishing a Rulemaking Proceeding to Implement the Mississippi Telephone Solicitation Act (June 19, 2003), General Rule A.9

¹ The effective period for registrations by consumers in Georgia is two years. Georgia Public Service Commission Utility Rule 515-14-1-05

Moreover, “a five-year registration period coupled with the periodic purging of disconnected telephone numbers from the registry adequately balances, on the one hand, the need to maintain a high level of accuracy in the national registry and, on the other hand, the onus on consumers to periodically re-register their telephone numbers.” Final Amended Telemarketing Sales Rule, *supra*, 68 Fed. Reg. at 4640 (2003) Consequently, since Tennessee is downloading the national list into its state Register, the state must have a system to purge the numbers on the state list that have been removed from the national list after 5 years. Otherwise Tennessee will have telephone numbers on the state list that are no longer on the national list even though the consumer registered on the national list, not the state list. Such an outcome would be inconsistent with the national program administering the TCPA.

Kentucky, although not enacting a definite time for which registrations are effective, nonetheless provides by administrative rule for updating or “scrubbing” that state’s “zero call” list by ILECs and CLECs, to reflect changes of address or termination of phone service. 40 KAR 2.077. *See* KRS §§367.46955, 367.46994(1)(a). Similarly, Louisiana, in addition to using the U.S. Post Office National Change of Address database² to purge those numbers that are not current, uses MCI’s directory assistance database since MCI is the do-not-call vendor for that state. The rationale is the same as that supporting the scrubbing of the database using LEC data: to reduce confusion and maintain the accuracy and integrity of the “no-calls” list. “Scrubbing” a “no-calls” list against LEC databases would result in more efficient investigation of subscriber complaints. For example, although a consumer’s “old” telephone number could be on the

² This database, although helpful, does not itself purge a no-call list of many non-current or non-assigned telephone numbers

list if not properly scrubbed, and his or her registration on file, the registration may no longer be valid or effective. This could result in confusion if that consumer files a complaint with the Authority.

Accordingly, the Colorado Public Service Commission has adopted a rule to assist in maintaining the accuracy of its “no-calls” list. The Colorado administrator is required to “update the database on an ongoing basis with information provided by residential subscribers and local exchange providers.”³ In discussing the rule, the Colorado commission stated:

Reliance on LECs to update the No-Call List is reasonable. Maintaining records of change, transferred, or disconnected numbers is an essential part of telephone numbering administration, a traditional, telephone public utility function. Even without a No-Call program, LECs must maintain such information as part of their local exchange business. For example, disconnected telephone numbers must be tracked on a timely basis to make these numbers available to subscribers.⁴

Consequently, requiring scrubbing of the Register against LEC databases, as well as the U S Post Office National Change of Address, would help ensure and improve the integrity of Tennessee’s program for consumers and provide solicitors with a more accurate “no-calls” list.

Hence, although TRA Rule 1220-4-11- 05 (d) provides that “(t)he Coordinator may purge the Register periodically in order to ensure accuracy,” there is no codified mechanism in Tennessee by which to systematically “scrub” the Register. Therefore, in

³ Commission Rules Concerning the Colorado No-Call List, 4 Code of Colorado Regulations (CCR) 723-22-4 1

⁴ Colorado Public Utilities Commission, Docket No. 01R-385T, In the Matter of Proposed Rules Regarding the Colorado No-Call list, Decision No. C01-1138, at pp. 9-11 (October 29, 2001)

addition to retaining current rule 1220-4-11-05 (1)(b), MCI and AT&T propose the following language to be added to Rule 1220-4-11-.05 (d):

In addition, the Coordinator will, on a monthly basis, compare the Register against local exchange company databases of current, assigned telephone numbers and the U S Post Office National Change of Address, or similar database and purge those telephone numbers that are not current, are no longer assigned to consumers whose telephone numbers are in the Register, or belong to those consumers who have moved out of state.

This addition will enhance the accuracy of Tennessee's "no-calls" list.

For the reasons set forth above, the existing rule does not need to be changed.

Because the amendment proposed by the Authority would result in an inaccurate list which would be detrimental to consumers and competition, it should not be adopted.

Respectfully submitted this 16th day of April, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2004 a copy of the foregoing document was served on the parties of record, via electronically, US mail or hand delivery:

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Jon E Hastings